No. 843

—IN THE—

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE NINTH CIRCUIT.

EMPIRE STATE IDAHO MINING & DEVELOPING COMPANY,
Appellant,

vs.

KENNEDY J. HANLEY,
Respondent.

BRIEF OF APPELLANT.

W. B. HEYBURN,
Solicitor for Appellant.

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BRIEF OF APPELLANT.

STATEMENT OF FACTS.

This is an appeal under Section 7 of the Act of March 3rd, 1891, establishing the Circuit Court of Appeals, and the amendment thereto, found in the 31 Statutes at Large, page 660.

The Circuit Court has, by an interlocutory order, granted an injunction in this cause, which is one from which a final decree might be taken under the provisions of the said Act to the Circuit Court of Appeals, and this appeal was taken

within 30 days from the date of the order granting the injunction.

The appellant owns an undivided seven-eighths interest in the Skookum lode claim, and the respondent owns an undivided one-eighth interest in said claim. It appears by the record that the appellant, at the time of the granting of the injunction, was mining ores within the Skookum claim; that the appellant and respondent were mining partners under the laws of Idaho, in the operation of said claim; that neither party was excluding the other from the claim; that an accounting was ordered and in progress between the parties to determine their relative proportion of the profits of said claim. No charge is made that the claim was not being worked in miner-like and economical manner, or that any waste or damage was being committed.

In the suit in which the injunction was granted it was originally alleged that Hanley owned certain interests, and that he was being excluded therefrom; that this appellant's grantor had wrongfully procured a deed from him for a one-eighth interest in the property, and the suit was brought to compel a cancellation of said deed. Some vague allegations as to the existence of ore were stated in the complaint, but neither side at the trial considered that any issue of the kind was presented, and the record so shows. The Court that tried the case was of the same opinion, and the record so shows.

This Court ordered that a decree be entered in conformity with its opinion, which was simply that Hanley was entitled to

a one-eighth interest, and that the deed should be cancelled.

The question before the Circuit Court was, what action should be taken in the case upon the filing of the mandate in the Court below.

The Court did not enter a decree upon the mandate, and took no action thereon except to make an order that Hanley should be allowed to enter the premises freely, which was conceded in open Court by this appellant; that Hanley should have an accounting, which was already ordered and in progress, and then the Court assumed to grant an injunction against this appellant, the owner of an undivided seven-eighths, enjoining it from extracting the ore or mining within the lines of the said Skookum claim, until the further order of the Court.

From that order this appeal is taken.

SPECIFICATION OF ERRORS.

This appellant specifies as error the order of the Court enjoining the appellant from extracting ore from the Skookum lode claim.

That such order was a violation of the rule of mining partnership as established by the statutes of the State of Idaho, which said statutes are set out fully in the assignment of errors presented with the petition for appeal in this cause.

The Court erred in enjoining the appellant from working the Skookum mine upon the petition of a minority owner in said property.

ARGUMENT.

Hanley's title to an undivided one-eighth interest in the Skookum claim is established by the decree of this Court, and there remains nothing further to be done so far as that question is concerned, so that the injunction in this cause cannot be said to have been granted pending the determination of the ownership of either of the parties to that controversy.

The inquiry arises as to how long this injunction is to be in force, and to what end and for what purpose? The Court does not say; it is simply until the further order of the Court. Is it intended as a punishment of the appellant that he should be enjoined for a certain length of time at the discretion of the Court. It cannot be intended that the injunction shall remain in force in order that the respondent may be enabled to make a favorable settlement with the appellant, or that the injunction shall remain in force that the respondent may use it as a lever in his attempt to compel the appellant to purchase his interest in the Skookum claim, or buy him off in the litigation. We are unable to discover any object that the Court could have in granting the injunction. It can hardly be conceived that the Court, anticipating the result of an accounting in progress, should enjoin the working of the property, the subject of the accounting.

Injunctions may be granted to secure parties in their asserted rights pending the determination thereof. They may be granted where one party excludes or threatens to exclude another from possession to which he is entitled, or where one partner refuses to account to another.

None of these facts now exist in this case. Courts do not grant injunctions because of things that happened in the past, if they do not continue at the time of the application for the order. Neither do Courts use the injunctive process as a means of punishment; neither do Courts collect judgments by injunctions.

Let us inquire as to what are the rights of these parties under the laws of Idaho, because it is the laws of that State that must govern them in their property rights, and the right to work a mine is a property right, regulated by statute and no Court can disregard the right given by such statute.

The Supreme Court of Idaho, in interpreting the statute regulating mining partnerships, says:

"Section 3300, Rev. St. of Idaho, is as follows: A min-
" ing partnership exists when two or more persons, who make
" or acquire a mining claim, for the purpose of working it, and
" extracting the mineral therefrom, actually engage in working
" the same. 'It is not necessary that all the co-owners in a
" mining claim shall engage in working the mine, together or
" separately. The partnership exists without an agreement,
" either express or implied. Section 3301 is as follows: 'An
" 'express agreement to become partners, or to share the profits
" ' and losses, is not necessary to the formation or existence of
" ' a mining partnership. The relation arises from the owner-
" ' ship of shares or interests in the mine, and working the
" ' same for the purpose of extracting the ores therefrom.'
" The relation differs from that of tenants in common, in this:

"That the co-owners in a mine are partners without agree-
"ment to become such, while tenants in common are not,
"except by agreement.

"The necessity for this relationship arises from the
"character of the property, as in working the mine the very
"life, the substance, the sole value of the property is taken
"out and carried away, leaving the ground from whence the
"precious metal is taken barren and worthless for mining pur-
"poses, which in this case, as in others of like nature, is its
"sole and only value. This partnership is admitted by the
"defendant, as it admits that the plaintiff is entitled to seven-
"eighths of the proceeds after paying the same proportion of
"expenses, and so it is specified in the statutes (Section
"3302). 'A member of a mining partnership shares in the
"profits and losses thereof in the proportion which the inter-
"'est or share he owns bears to the whole partnership, capital
"or number of shares.' The mine is the partnership property;
"whether purchased with partnership or individual funds, and
"so says the statute (Section3304): 'The mining ground
"owned and worked by partners in mining, whether purchased
"'with nartnership funds or not, is partnership property.'
"From the foregoing provisions it follows that those owning
"a majority of the shares or interests in a mining partnership
"have the right to control its methods of working, and thus
"says the statute (Section 3309): 'The decision of the mem-
"'bers owning a majority of the shares in a mining partner-
"'ship binds it in the conduct of its business.'

" In Dougherty vs. Creary, 30 Cal., 300, the Court says: " ' It is indispensable to the conducting of the business of min- " ' ing that those owning the major portion of the property " ' should have the control in case all cannot agree.' Further " on the Court says: 'It might and often would work great in- " ' convenience and damage to the minority in interest of a " ' mining partnership, if the majority were allowed to do as " ' they might deem to their own advantage regardless to the " ' rights and interests of the minority. But, notwithstanding " ' the danger of the abuse of power in such cases, what may " ' be necessary and proper for carrying on the business of " ' mining for the joint benefit of all concerned must be de- " ' termined by those owning and holding in the aggregate the " ' major part of the property;' and, if the power thus held " and exercised by the majority is used in a manner that will " imperil or disastrously affect the interests of the minority, " the latter has the right to resort to the Court for redress " and protection. It was long since decided by the Courts that " a mining partnership differed from an ordinary partnership " in many of its features, among which are the following: It " is formed without any express agreement between the parties " existing from joint ownership in a mine, and working the " same. One partner may sell his interest without the consent " of the others or die, and the partnership is not dissolved. A " new owner may purchase an interest in the mine, or inherit " it, and he becomes a mining partner in the working thereof. " Duryea vs. Burt, 28 Cal., 579. It differs from an ordinary " partnership in another respect, also, in that, as stated above,

"the majority in interest have the right to control the method "of working and the means to be employed. In these re- "spects, and in its continuity, it resembles a private corpora- "tion. To avoid mistakes in the position of the parties there- "to, and the condition of the property, all of these character- "istics have been enacted in a statute, as quoted above, in this "State, and also in California and in other mining States. "The case of McCord vs. Mining Company, 64 Cal., 134, is "largely relied upon by the respondent in this case; but that "case does not militate against this opinion. In that case the "majority interest was working the mine, and the questions, "as stated by the Court were, Do the excavating and removing "of cinnabar from a quicksilver mine, or the cutting of timber "trees used in working the mine, by one tenant, constitute "waste from which his co-tenants may recover trebble dam- "ages? Do such excavation, and cutting and conversion, con- "stitute waste which should be enjoined? Are the plaintiffs "entitled to an accounting? These are entirely different "questions from those in the case at bar. In this case the "plaintiff owns the majority interests and asks to be permit- "ted to control the management of the mine, and the method "of working the same, the means employed and that defend- "ant be enjoined, and for an accounting. The facts set forth "in the answer and in defendant's own affidavit furnish abund- "ant reason why the prayer of the plaintiff should be granted."

Hawkins vs. Spokane Hydraulic Mining Company, 28 Pac., 433.

This case was again in the Supreme Court of Idaho, re-

ported in the 33 Pac., page 40, and the doctrine was re-affirmed in a very strong opinion by the unanimous Court. This is the latest expression of the Supreme Court of Idaho on the subject, and establishes the rule that will be followed by this Court.

The Supreme Court of Montana and of some other states have held differently, and have criticised the conclusions of the Supreme Court of Idaho, but such decisions do not affect the rule in Idaho nor afford any reason why this Court should diregard the interpretation the Supreme Court of Idaho has placed upon the statutes of that State.

So long as the appellant does not exclude the respondent and works the mine in an economical and workman-like manner, and accounts for the proceeds according to the ownership in the mine, there can be no ground for enjoining the appellant, nor can any good purpose be served thereby.

It appears by the record that one-sixteenth of the gross proceeds of the ore taken from the Skookum lode claim is now, and for several months past, has been deposited in a bank designated by the Court to the credit of the Court to answer any claim which Hanley may be found upon the accounting to be entitled to as representing his one-eighth interest in the Skookum claim.

If Hanley has any claim for ores that were extracted prior to the judgment in his favor, he will be entitled to a judgment for the value of such ores, whatever that may be determined to be and will have the right to make his judgment as other judg-

ments are made, through the means of an execution issued in the usual way.

He is not entitled to sequester the property of the appellant to secure a debt or obligation; debts are not collected in Courts of equity in that manner.

It is not contended that appellant is insolvent, and if such contention is urged the appellant can give any bond that the Court may require in the premises. There is no admixture of ore except under the conditions and agreed method provided by the order heretofore made by the Court and now in force.

The injunction should not have been granted and the order of the Circuit Court should be reversed.

Respectfully submitted,

W. B. HEYBURN,

Solicitor for Appellant.

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vs.

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Respondent.

MOTION TO DISMISS APPEAL.

Comes now the respondent, Kennedy J. Hanley, and moves to dismiss the appeal hereto filed by the appellant in this action, and for grounds thereof assigns:

That the appeal purports to have been taken on behalf of the defendant Empire State-Idaho Mining and Developing Company, from an order made by the Circuit Court enjoining defendants, to-wit: Charles Sweeny, F. Lewis Clark and the appellant, and their agents, employes and persons acting under their authority, from taking or extracting any ores from the Skookum Mine, situated in Yreka Mining District, Shoshone County, Idaho, until further order of the Court.

And it appears from the appeal that the said defendants, Charles Sweeny and F. Lewis Clark, were not made parties to the appeal, and no reason is assigned for or any order made by the Court below to allow said parties to be omitted from said appeal.

Wherefore, respondent prays that said appeal be dismissed with his costs.

JOHN R. McBRIDE, AND
M. A. FOLSOM,
Solicitors for Appellee.

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The Circuit Court having on the 17th day of May, 1902, made an order enjoining the defendants, Charles Sweeny, F. Lewis Clark and the Empire State-Idaho Mining and Developing Company in this suit, from working or taking any ore from the Skookum Mine, the subject of litigation between Kennedy J. Hanley and said defendants, until further order of the Court, one of the defendants, to-wit: the Empire State-Idaho Mining and Developing Company, has taken an appeal from that order to this Court.

We ask that this appeal be dismissed on the ground that the proper parties have not appealed. This suit has been in progress four years, and it has been a year since by decree of this Court the plaintiff was decided to be the owner of an undivided one-eighth interest in the mine in controversy.

The matter of an accounting against the defendants for valuable ores extracted from the mine by said defendants since the commencement of the action and from the 30th day of April, 1898, has not yet been completed, having been arrested by an order of the Circuit Court in March of the present year.

An appeal by one of the parties in this action can not be entertained unless the parties omitted shall have been permitted by the Court to sever from the appealing party. It is the undoubted rule that the parties taking an appeal must all be named in the appeal; it is for reason which the authorities fully sustain. The Court will not upon appeal try a cause by piecemeal, for, if one defendant may take an appeal without joining his co-defendants, each defendant may take an appeal, and thus the appeal proceedings be split up into as many appeals as there are defendants. In support of this motion we cite:

Masterson vs. Herndon, 10 Wall. 416.
Hardy vs. Wilson, 13 Supreme Court Rep., 39.
Davis vs. Trust Company, 14 Supreme Court Rep., 693.
Beardsley vs. Arkansas L. R. Company, 156 U. S.
Wilson vs. Kissel, 17 U. S. Sup. Court Rep., 124, and cases cited.

We respectfully submit that this appeal must be dismissed.

JOHN R. McBRIDE, AND
M. A. FOLSOM,
Solicitors for Appellee.